In the Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

v.

CITY OF LONG BEACH, CALIFORNIA, a municipal corporation, and STATE OF CALIFORNIA,

Respondents.

77-1603

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

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QUESTION PRESENTED

Is a question presented for this Court's review where, applying California's long-standing rule regarding public rights in real property arising as a result of the doctrine of implied dedication, the lower courts found such rights to exist in the subject unimproved beach property, based upon evidence of 60 years of continued public use of said

property for recreational purposes without permission being asked or received, and without significant interference or objection to such use from the fee owner, and upon evidence of 45 years of public maintenance of that beach, at great public expense, with full knowledge of the fee owner?

STATEMENT OF THE CASE

The opinion below *only* concerns the seaward portion of petitioner's lot which has always been a part of an open and unimproved sandy beach in what is now and for many years has been highly populated urban area of Southern California. (*City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 142 Cal.Rptr. 593).[1]

The State court's holding that the public has acquired a prescriptive easement to continue to use this beach land for recreational purposes does not depend upon any presumption. "It was only after the taking of evidence that the court found a recreational easement. . ." (75 Cal. App.3d at 978.) The decision is firmly based on substantial evidence showing 60 years of continuous public use of the beach (75 Cal. App.3d at 979) and 45 years of maintenance by the City of Long Beach (75 Cal. App.3d at 979).

Indeed, the evidence indicates that but for the efforts of the City to control the severe erosion of this beach, the property would have been washed away. Sandfill was

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[1]On appeal, the City and the State waived and abandoned any claim to a public recreational easement over that portion of the Daugherty property improved at the time of trial. The opinion below modified and affirmed the judgment accordingly. (75 Cal.App.3d at 981-983.)

placed on all of the subject property at great public expense. Prior to 1945-46 the beach at and in the vicinity of the Daugherty property suffered from severe erosion and as a result was very narrow. The ocean tides, from time to time, covered up to 60% of the seaward portion of the Daugherty lot including all of the property here in question. After 1945-46, the City expended over two million dollars in public funds in an effort to control erosion and to protect the beach from washing away. Sandfill was placed on the seaward 64 feet of the Daugherty property, including all of the property here in question. The beach at this point was thus widened by sandfill by some 500 feet; no private moneys were contributed to the cost of beach stabilization. (75 Cal. App.3d at 975.)

When petitioner purchased the property in 1961 the public had been accustomed to using this beach land for ". . . fishing, swimming, shell collecting, ball-playing and picnicking . . ." for more than 50 years. (75 Cal. App.3d at 975). The public use is current as well as of long duration. (75 Cal. App.3d at 975.) Under these circumstances, it is unreasonable for petitioner to expect to exclude the public today. This is the reasoning underlying the law of implied dedication by public user set forth in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, [84 Cal. Rptr. 162], and applied in the opinion below.

The rule of law derives from a long-declared constitutional, statutory and judicial policy favoring public use of California's beaches and rests on clearly expressed judicial precedent in California dating back to the early days of statehood. Respondents submit that this rule of law does not violate any provision of the United States Constitution and as applied to the opinion below does not present a question for review by this court.

ARGUMENT

I

THE GION CASE DID NOT CHANGE THE LAW RESPECTING DEDICATION BY PUBLIC USER IN CALIFORNIA

A. Introduction.

In *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, [84 Cal. Rptr. 162][2] the California Supreme Court held there was sufficient evidence to establish an implied-in-law dedication of a recreational easement over coastal properties where the public had used the beach as if it were a public recreational area for more than five years without asking or receiving permission and without significant objection or interference from the fee owners. (2 Cal.3d at 43.) The court noted that evidence of governmental maintenance of the land is significant in establishing implied dedication to the public. (2 Cal.3d at 43-44.)

As will be demonstrated below, the decision logically follows a long judicial precedent in the common law, and is consistent with long declared constitutional, statutory, and judicial policy in California.

B. Dedication in English and American Common Law Dates From the 18th Century.

Dedication was first reported in English cases dating back to the 18th Century. See *Rex v. Hudson* (K.B. 1732)

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[2]The *Gion* case was consolidated with *Dietz v. King* in the State Supreme Court.

93 Eng.Rep. 935; *Lade v. Shepherd* (K.B. 1735) 93 Eng.Rep. 997; *Rugby Charity v. Merryweather* (K.B. 1790) 103 Eng.Rep. 1049.

The doctrine was reiterated and developed in many subsequent cases[3] and carried over intact into the American common law. In 1827 this Court upheld the doctrine in a case involving a spring, which had always been used by the public as if it were public. Chief Justice Marshall specified the factors behind the Court's decision:

> ". . . The reasonableness of reserving a public use; the concurrent opinion of all the settlers, that it was so reserved; the universal admission of all, that it was never understood, that the spring lot was drawn by any person; the early appropriation of it to public purposes; the fact that James McConnell actually claimed a different lot, added to the length of time which has been permitted to elapse, without any assertion of title to this lot, are, we think, decisive against the appellant." (*McConnell v. Lexington* (1827) 25 U.S. (12 Wheat.) 582, 586.)

In 1832, this Court decided *Barclay v. Howell* (1832) 31 U.S. (6 Pet.) 498, affirming a dedication of access over riverfront land. Factors this Court considered to support the dedication included the lapse of time in the alleged owner's claim, the public use during the period and the need of the public for access. The court indicated that "six

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[3]*Rex v. Lloyd* (K.B. 1808) 1 Camp.262; *Rex v. Barr* (K.B. 1814) 4 Camp. 16; *Poole v. Huskinson* (Ex. 1843) 11 M. & W. 827; *Regina v. East Mark* (1848) 116 Eng.Rep. 701; *Bateman v. Bluck* (1852) 118 Eng.Rep. 329; *Regina v. Broke* (Nisi Prius 1859) 1 F. & F. 514; *Vernon v. Vestry of St. James, Westminster* (1880) 16 Ch.D. 457.

or seven years" (rather than thirty) had been sufficient evidence of dedication in some cases (31 U.S. at 512).

In *Cincinnati v. White* (1832) 31 U.S. (6 Pet.) 431, this Court expressed the concept of dedication *implied in law* that the California Supreme Court relied on in *Gion.* As the Court discussed it in *Cincinnati:*

> "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis v. Dean*, already referred to, with respect to a street; and the same rule must apply to all public dedications; and *from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed.* In the present case there having been an actual dedication, fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rex v. Lloyd,* 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, *he shall be presumed to have dedicated it to the public."* (31 U.S. (6 Pet.) at 440.) (Emphasis added.)

The *Cincinnati* case was discussed and approved in *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662, again in relation to waterfront property. Many other

cases in state courts have come to the same conclusion, that long-standing public user gives rise to a dedication implied in law. (*See, e.g. Valentine v. City of Boston* (1839) 39 Mass. (22 Pick.) 75.)

It is submitted that the expression of this principle by the California Supreme Court 138 years later in *Gion* is not a "drastic redefinition" of the law, as petitioner claims. (Pet. Br. at 20.)

C. California Law of Dedication Dates From the Early Days of Statehood.

Numerous California cases have treated the principle of implied dedication, but perhaps its earliest recognition came in *City of San Francisco v. Scott* (1854) 4 Cal. 114. In that case the length of public use, four to five months, was deemed too short to give rise to a dedication. (4 Cal. at 117.) However, the Court named three ways in which a dedication could arise: (1) by deed or overt act of the landowner (*express* dedication); (2) by presumption from long-continued public use (dedication *implied in law;* (3) by presumption from the acquiescence of the landowner in the public use (dedication *implied in fact*).

As to dedication implied in law, the court said that no specified length of use established the presumption. (4 Cal. at 116.) It was later held that public use must endure for the period of limitations to recover real property. (*See, Hartley v. Vermillion* (1903) 141 Cal. 339, 348-349, [74 P. 987].)

In 1895 the California Supreme Court clearly stated the law of implied dedication in *Schwerdtle v. Placer County,* 108 Cal. 589, [41 P. 448]. The public had used the landowner's property for some thirty-seven years, from

which the trial court ruled that a dedication had occurred as a matter of law. The California Supreme Court affirmed, holding that adverse use for the five-year period of limitations established a conclusive presumption of assent in the dedication, and negated any claim that the use was under a license. (108 Cal. at 593, 596.)

The Court reaffirmed its opinion in 1903 in *Hartley v. Vermillion, supra,* 141 Cal. 339, holding that public use without objection of the landowner negates any asserted presumption of permission or license. (141 Cal. at 349.)

In *Union Transportation Co. v. Sacramento* (1954) 42 Cal.2d 235 [267 P.2d 10], the California Supreme Court reiterated the law developed in the *Schwerdtle* and *Hartley* cases, and in particular, noted the distinction between dedications implied in *law* and dedications implied in *fact.* Dedications implied in fact occur when a property owner long acquiesces in public use under circumstances negating the idea of use by license. (42 Cal.2d at 240). In contrast, dedications implied in law occur when the public has used the property for more than five years with full knowledge of the owner, without receiving permission and without objection being made by anyone. When these elements exist, the Court held, "a conclusive presumption of dedication arises." (42 Cal.2d at 240.)

D. The Gion Case Followed These Numerous Precedents.

It was in tune with the over 200 years of development of the principle of implied-in-law dedication that the California Supreme Court decided *Gion v. City of Santa Cruz, supra,* 2 Cal.3d 29.

Reviewing the cases,[4] particularly *Schwerdtle v. Placer Co., supra,* 108 Cal. 589 and *Union Transportation Co. v. Sacramento, supra,* 42 Cal.2d 235, the *Gion* court explained and clarified the doctrine of implied dedication.

The Court first noted the distinction between implied-in-fact and implied-in-law dedications, then clearly explained that under the implied-in-law principle, all that is necessary is that the public use the property for the five-year period of limitations without permission or significant interference or objection from the fee owner. This in itself is "adverse use." There is no presumption that public use of beach lands is permissive. Whether the use was permissive or under a license is a question of fact. (*Gion v. City of Santa Cruz, supra,* 2 Cal.2d at 40-41.)

Applying these principles to the beaches in that case, the court recounted the long history of California's policy encouraging public use of and access to the shore. This tradition of public access, which dates back to pre- and early-Statehood days,[5] was firmly fixed in the California Constitution of 1879 in Article XV, Section 2 (now Art. X, § 4):

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[4]The Court cited ample precedent for dedication of beaches and stated, "In this state, for instance, the public has gained rights, through dedication . . . in beaches (see, e.g., *Washington Blvd. Beach Co. v. City of Los Angeles, supra,* 38 Cal.App. 2d 135; *Morse v. Miller, supra,* 128 Cal.App.2d 237; *Morse v. E.A. Robey Co.* (1963) 214 Cal.App.2d 464 [29 Cal.Rptr. 734]; *E.A. Robey & Co. v. City Title Ins. Co., supra,* 261 Cal.App.2d 517)." (2 Cal.3d at 42.)

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[5]See Comment, *California Beach Access: The Mexican Law and the Public Trust,* 2 Ecol.L.Q. 571 (1972).

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water."

The intent of this constitutional mandate was expressed in numerous state statutes and court decisions, the court pointed out.[6]

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[6]"Among the statutory provisions favoring public ownership of shoreline areas is Civil Code, section 830. That section states that absent specific language to the contrary, private ownership of uplands ends at the high-water mark. The decisions of this court have interpreted this provision to create a presumption in favor of public ownership of land between high and low tide. (See Kimball v. MacPherson (1873) 46 Cal. 103, 108; Upham v. Hosking (1882) 62 Cal. 250, 258; Long Beach Land & Water Co. v. Richardson (1886) 70 Cal. 206, 209, 11 P. 695; Freeman v. Bellegarde (1895) 108 Cal. 179, 185, 41 P. 289; People v. California Fish Co. (1913) 166 Cal. 576, 591-596, 138 P. 79: Abbot Kinney Co. v. City of Los Angeles (1959) 53 Cal.2d 52, 57, 346 P.2d 385.)

". . . .

"Other legislative enactments that indicate the strong public policy in favor of according public access to the coast include: (1) Article I section 25 of the California Constitution (guaranteeing the right to fish); (2) Government Code, sections 54090-54093 (relating to discrimination in beach access); (3) Government Code, sections 39933-39937 (implementing Cal.Const. Art. XV, § 2, and requiring municipalities to maintain access to navigable waters); (4) Fish and Game Code, section 6511 and Public Resources Code, section 6008 (restrictions on sales and leases of public lands in Humboldt Bay in order to preserve public access); (5) Public Resources Code, section 6210.4 (requiring the state to reserve convenient access to navigable waters in connection with the sale or other disposition of shoreline lands); and (6) Public Resources Code, section 6323 (forbidding

E. Petitioner Is Not Justified in Relying on the Hihn Case.

Petitioner makes much of the case of *F. A. Hihn Co. v. City of Santa Cruz*, (1915) 170 Cal. 436, [150 P. 62]. Yet that case did not, as petitioner contends, express accurately the law of implied dedication. Four reasons negate the *Hihn* case's value as precedent.

First, the paragraph quoted as supporting a presumption that a license is given to the public who use open beach land[7] is pure dictum. The California Supreme Court opened that paragraph thus:

> "Whether the facts shown establish dedication of the land to the public use for pleasure grounds is a question that might be dismissed with the simple statement that *the answer did not set up a dedication and that the finding in this regard was outside of the issues.*" (170 Cal. at 447.) (Emphasis added.)

Second, as the *Gion* court pointed out, any confusion engendered by the *Hihn* dictum would have been clearly erased by the 1948 decision in *O'Banion v. Borba* (1948) 32 Cal.2d 145, [195 P.2d 10].[8]

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structures on artificially accreted lands so that such accretions will remain an unobstructed and open beach)." (2 Cal.3d at 42-43.)

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[7]Pet. Br. at 19-20.

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[8]The *Gion court quoted O'Banion* thus:

> " 'The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences

Third, the decision in *Hihn* was not on point, being a case of dedication implied in *fact*, rather than implied in *law*. It thus is not relevant as to latter situations. The additional cases cited by petitioner also suffer from the same defect.

Finally, as observed by the court below, "It was only after the taking of evidence that the court found a recreational easement, and that finding was based on public use of the beach, and maintenance of the beach by governmental entities." (*City of Long Beach v. Daugherty, supra*, 75 Cal.App.3d at 978.)

It must be noted that the trial court said that:

> "The evidence herein is insufficient to support a finding that any defendant (or predecessor in title) granted a license to the public to use his property or that any defendant made a bona fide

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that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions.' (32 Cal.2d at 148-149.)" (2 Cal.3d at 40-41.)

Overlooked by the *Gion* court and by petitioner herein was a line of cases holding that public use is presumed adverse and not permissive. In an implied dedication case in 1951, a California court said:

> "There is a general presumption that use by other than the owner is adverse and not permissive. While this presumption is not as strong when the land is open and uncultivated and remote, as when it is enclosed, cultivated and developed [citing *Hihn*, inter alia,] the presumption exists in either case." (*People v. Sayig* (1951) 101 Cal.App.2d 890, 897 [226 P.2d 702].) (*Cf. City of Laguna Beach v. Consolidated Mortg. Co.* (1945) 68 Cal.App.2d 38, 44-47, [155 P.2d 844].)

> attempt to prevent public use before the easement was ripened into existence by the passage of five years. *The [no trespassing] signs pictured in evidence are witnesses to the contrary* for at least a period subsequent to the birth of the recreational easement." (Pet. Br., App. D. 11-12.) (Emphasis added.)

Thus petitioner herein would not have been helped by any presumption that the use was by license, because such a presumption would have been rebutted by the evidence.

That petitioner must rely on a paragraph of dictum from the *Hihn* case, while completely ignoring the long line of cases supporting the *Gion* decision, and the opinion below, is obvious testimony to the weakness of her case.

Also inapposite to the case at bar are the two federal decisions cited by petitioner, *Hughes v. Washington* (1967) 389 U.S. 290, and *Sotomura v. County of Hawaii* (D. Hawaii 1975) 402 F.Supp. 95. The *Hughes* case dealt with the question "whether federal or state law controls the ownership of accreted land gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to Statehood." (*Hughes v. Washington, supra*, 389 U.S. at 290-91.) The case thus revolved around a federal/state conflict of laws issue, with which Mr. Justice Stewart's concurring opinion was not directly concerned.

The *Sotomura* case dealt with an actual change in the boundary lines of the plaintiffs' land, which had been previously decided in the Land Court. The District Court held that the plaintiffs should have been afforded an opportunity to present evidence against fixing the seaward boundary of their property at the vegetation line. (*Soto-*

mura v. Count of Hawaii, supra, 402 F.Supp. at 99.) Petitioner herein was not prevented from presenting evidence in the trial court. As noted above, her evidence was not only insufficient, but it even contradicted the idea that the use was under a license.

F. The Application of California's Long-Standing Doctrine of Implied Dedication by the Courts Below Did Not Effect a Taking of Vested Property Rights.

Rather than being a "drastic redefinition" of the California law of implied dedication, as petitioner contends, the *Gion* decision was a careful restatement and clarification of law that had long existed.

As detailed above, the *Gion* court rested its opinion squarely on the California Constitution (written in 1879), statutes going back many years, and court decisions reaching back at least to the 1890's (e.g., *Schwerdtle v. Placer County, supra,* 108 Cal. 589).[9] In applying this impressive history of statutory and judicial precedent to the facts, the *Gion* court was careful to stay within the bounds of the federal Constitution:

> "Although article XV, section 2 may be limited to some extent by the United States Constitution it clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the federal Constitution." (*Gion v. City of Santa Cruz, supra,* 2 Cal.3d at 43.)

It was with this careful approach to balancing state and federal law, private property rights and public access

[9]As noted above, the doctrine goes back to 1854 in California, p. 7, *supra.*

rights, that the California Supreme Court came to its judicious conclusion in *Gion.*

It therefore appears farfetched for petitioner, who only purchased the property in 1961, to argue that she somehow relied on a paragraph of dictum from the 1915 *Hihn* case, in contrast to the reality of over a century of precedent for the *Gion* holding. Moreover, the facts in this case are even weightier than the *Gion* facts. Here the subject property was existent chiefly owing to the City's expenditure of over $2 million on maintenance and erosion control. (*City of Long Beach v. Daugherty, supra,* 75 Cal.App.3d at 975.) In addition, the beach has been continuously used for over 60 years as if it were a public recreational area. (75 Cal.App.3d at 975.)

In short, the decision in *Gion* and its application to the beach property in the present case effected no "taking" of vested property rights.

II

THE "IMPAIRMENT OF CONTRACTS" CLAUSE OF THE U.S. CONSTITUTION IS ONLY DIRECTED TOWARD STATE LEGISLATIVE ACTION, NOT COURT DECISIONS.

Petitioner's claim that the *Gion* decision effected a "retroactive" change in the law is wrong, as discussed in Point I, *supra.*

But even when a change *is* made in the law by a judicial desicion, such change is not in violation of the "impairment of contracts" clause, United States Constitution, Article I, section 10. Numerous decisions of this Court have stated this simple rule of law, e.g., *Barrows v.*

Jackson (1953) 346 U.S. 249, rehg. den. 346 U.S. 841; *McCoy v. Union Elevated R.R. Co.* (1918) 247 U.S. 354; *Kryger v. Wilson* (1916) 242 U.S. 171; *Cleveland & Pittsburg R.R. Co. v. Cleveland* (1914) 235 U.S. 50. In *Barrows* this Court dealt with the issue succinctly:

> "It is contended by petitoners that for California courts to refuse to enforce this covenant is to impair the obligation of their contracts. Article I, § 10, of the Federal Constitution provides: 'No State shall. . . pass any. . . Law impairing the Obligation of Contracts. . . .' The short answer to this contention is that this provision, as its terms indicate, is directed against *legislative action* only.
>
> " 'It has been settled by a long line of decisions, that the provisions of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. . . .' *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451." (*Barrows v. Jackson, supra*, 346 U.S. at 260.) (Emphasis added.)

In light of this clear statement, the assertion by petitioner that a judicial decision in *Gion* or the case below impaired a contract[10] is totally devoid of merit.

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[10]The only case cited by petitioner for this point, *Muhlker v. New York and Harlem R.R. Co.* (1905) 197 U.S. 544, has been consistently distinguished on the basis that a *statute* had been passed subsequent to the contract involved in that case. (*See, e.g., Tidal Oil Co. v. Flanagan* (1923) 263 U.S. 444; *Chicago & Alton R.R. v. Tranbarger* (1915) 238 U.S. 67; *Ross v. Oregon* (1913) 227 U.S. 150.) In *Tidal Oil Co. v. Flanagan*, for example, this Court made it clear that "In such a case [referring to the *Muhlker* case] this Court accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the *statute* as enforced by the State through its courts which impairs the contract, not the judgment of the court." (263 U.S. 444, 453). (Emphasis added.)

CONCLUSION

The Court below correctly applied the California law of implied dedication, which was reaffirmed and clarified in *Gion v. City of Santa Cruz, supra,* 2 Cal.3d 29. As the expression of long-existing California law, that doctrine did not operate retroactively on the beach property of petitioner. Hence, its application did not violate the Fifth or Fourteenth Amendment to the United States Constitution.

Further, as a judicial decision, the application of the doctrine did not violate the "impairment of contracts" clause, falling wholly outside the scope of that clause.

Therefore, petitioner's argument has no merit as a Constitutional question, and should not be entertained by this Court. For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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